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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1933

No. 614

CHRIS LARSEN, PETITIONER,

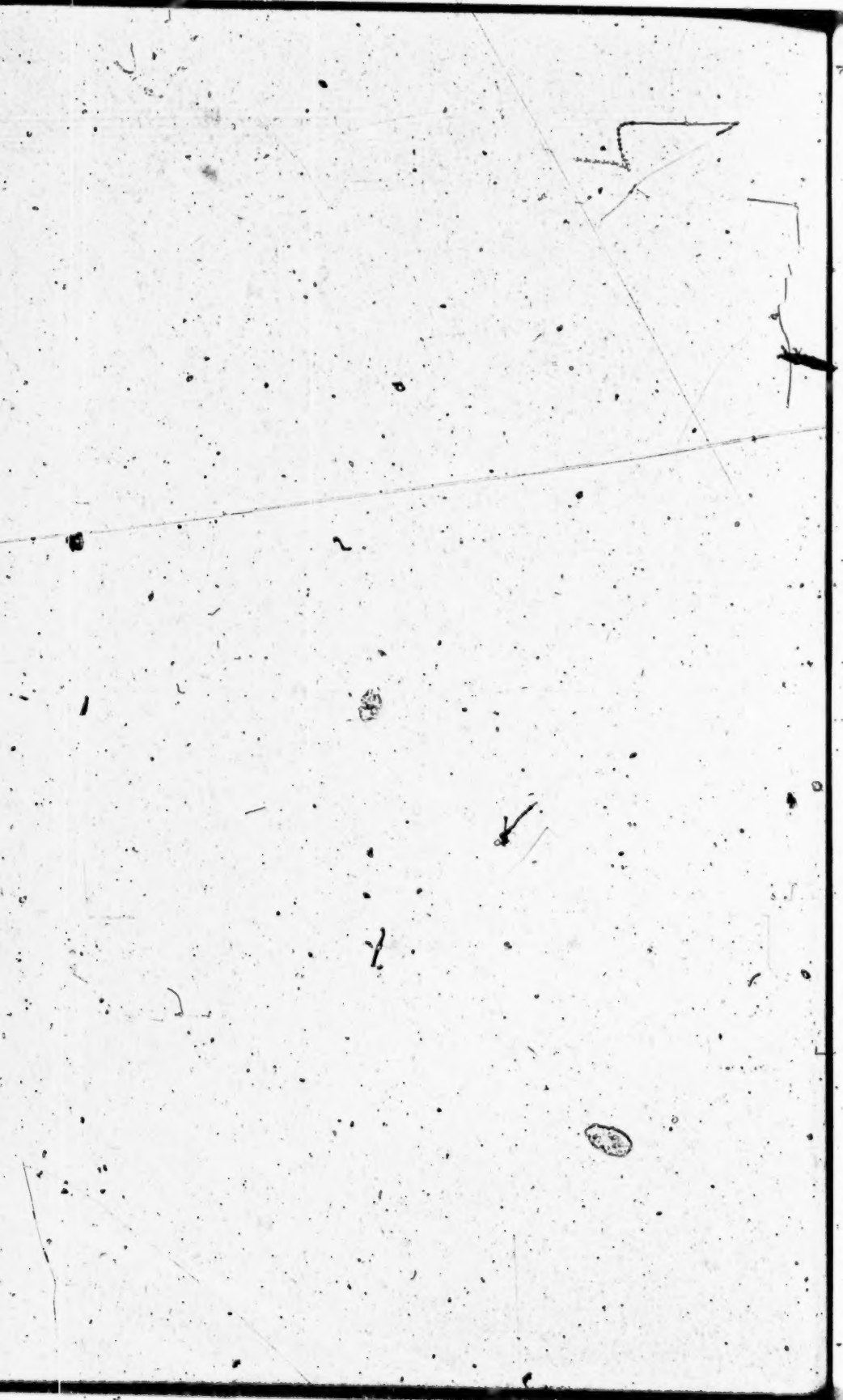
vs.

NORTHLAND TRANSPORTATION COMPANY, CHARTERER OF THE AMERICAN MOTOR VESSEL "NORCO"

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 1, 1933

CERTIORARI GRANTED JANUARY 8, 1934.



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NAMES AND ADDRESSES OF PROCTORS.

MESSRS. BOGLE, BOGLE & GATES,
609-24 Central Building, Seattle, Washington.
Proctors for Appellant.

MESSRS. VANDERVEER & BASSETT,
511 Alaska Building, Seattle, Washington.
Proctor for Appellee. [1]*

In the United States District Court for the Western District of Washington, Northern Division.

IN ADMIRALTY

No. 13,301

In the Matter of the Petition of

NORTHLAND TRANSPORTATION CO., a corporation, Charterer of the American Motor Vessel NORCO for LIMITATION OF LIABILITY.

STATEMENT.

The petition for limitation of liability was filed on October 1, 1932, and therewith affidavits of value, and on said date an order for ad interim stipulation was entered and an ad interim stipulation filed and approved, and on said date an order directing issuance of monition, returnable on November

*Page numbering appearing at the foot of page of original certified Transcript of Record.

10, 1932, was entered, and monition and citation were issued accordingly and due service thereof had as provided in said order.

On October 7, 1932, the appellee Chris Larsen filed exceptions to the petition for limitation of liability and a demurrer and motion to dismiss the same, together with the affidavit of G. F. Vanderveer in support of said motion, to which there was attached certified copies of all pleadings filed in the state court, which said exceptions, demurrer and motion to dismiss were argued on November 7, 1932, and the court's memorandum opinion sustaining the motion to dismiss was filed on November 22, 1932, and order of dismissal entered on December 5, 1932, from which said order of dismissal this appeal is taken."

BOGLE, BOGLE & GATES,
Proctors for Appellant.
VANDERVEER & BASSETT,
Proctors for Appellee.

[Endorsed]: Filed Dec. 15, 1932. [2]

[Title of Court and Cause.]

PETITION FOR LIMITATION OF LIABILITY.

To the Honorable Judges of the Above Entitled Court:

The petition of Northland Transportation Co., a corporation, charterer of the American Motor

Vessel NORCO, her engines, boilers, boats, machinery, tackle, apparel, furniture, and appurtenances, in a cause of limitation of liability, civil and maritime, alleges as follows:

I.

That petitioner, Northland Transportation Co., is now, and was at all times herein mentioned, a corporation organized and existing under and by virtue of the laws of the State of Washington, with its principal office and place of business in Seattle, State of Washington, and is now, and was at all times herein mentioned, the charterer and operator of the American Motor Vessel NORCO, her engines, boilers, boats, machinery, tackle, apparel, furniture and appurtenances, and manned, victualed and navigated said vessel at its own expense, of which said vessel The Citizens Light, Power & Water Co., a corporation, is now and at all times herein mentioned was the owner. [3]

II.

That heretofore and on or about the 20th day of July, 1931, said vessel commenced loading at the port of Seattle for a voyage to the port of Juneau, Alaska, and thereafter sailed on said voyage which terminated at said port of Juneau on the 25th day of July, 1931, being the voyage in connection with which your petitioner seeks limitation of liability herein.

III.

That Chris Larsen was a seaman employed as a member of the crew of said vessel on said voyage and on the 20th day of July, 1931, while said vessel was loading at the port of Seattle, said Chris Larsen while engaged in loading said vessel as a member of the crew of said vessel, suffered personal injuries thereon resulting in the institution of an action by the said Chris Larsen, through his attorneys, Vanderveer & Bassett, Alaska Building, Seattle, State of Washington, against your petitioner in the Superior Court of the State of Washington for King County, being cause No. 247091 of the files of said court, in which said action recovery in the sum of $25,000 was sought by reason of the alleged negligence of the winchdriver on said vessel going ahead with great speed on the winches, causing a strongback which had become attached to board slings which were being moved to strike said Chris Larsen and throw him through an open hatchway to the 'tween deck. That in said action a verdict of a jury was rendered on the 27th day of September, 1932, in favor of said Chris Larsen and against your petitioner in the sum of $12,500, and a judgment entered thereon on the 1st day of October, 1932, in the sum of $12,500, interest and costs, which said judgment remains wholly unsatisfied. [4]

IV.

That said judgment and claim of Chris Larsen exceeds the value of the interest of your petitioner

as charterer in said vessel, her engines, boilers, boats, machinery, tackle, apparel, furniture, appurtenances, and consumable stores, at the termination of said voyage, together with all freights and passenger monies pending on said voyage. That the total freight and passenger monies pending on said voyage amounted to the sum of Three Thousand Eight Hundred Fifty-six and no/100 ($3856.00) Dollars, which, together with the value of the interest of your petitioner as charterer in said vessel, her engines, boilers, boats, machinery, tackle, apparel, furniture, appurtenances, and consumable stores, at the termination of said voyage, did not exceed the sum or value of Four Thousand Six Hundred Fifty-one and 98/100 ($4651.98) Dollars.

V.

That at the time of the commencement of loading said vessel as aforesaid, and at the time of the accident and injury to said Chris Larsen, and at all times thereafter, during said voyage, the said vessel was staunch and seaworthy and was well and sufficiently supplied, manned, equipped, and all of her engines, boilers, boats, machinery, tackle, apparel, furniture and appurtenances were adequate and sufficient and free from defects, and the aforesaid injury, loss and damage to said Chris Larsen, and any and all other injuries, losses, destructions and damages, whether of or to life or persons or property, or goods, wares or merchandise, done, occasioned or incurred upon the voyage of said vessel

aforesaid, were done, occasioned or incurred, if at all, without the consent, or privity, or knowledge, or design, or neglect of your petitioner, or any of its [5] directors, officers, agents, or servants, and your petitioner requests leave to contest its liability therefor.

VI.

While not admitting liability therefor and reserving the right to contest the same, if any, your petitioner desires to limit its liability for each and every of the aforesaid injuries, losses and damages, sustained by said Chris Larsen, and for all other injuries, losses, destructions, and damages, whether of or to life or persons or property, or goods, wares or merchandise, done, occasioned or incurred upon the voyage of said vessel aforesaid, and in that behalf petitioner does hereby claim the benefit of the limitation of liability provided for in Sections 4282 to 4289 inclusive, of the Revised Statutes of the United States, and any and all acts amendatory thereof or supplemental thereto.

VII.

Petitioner claims that it is entitled to have its liability in the premises, if any, limited to the value of its interest, as charterer, in the Motor Vessel NORCO, her engines, boilers, boats, machinery, tackle, apparel, furniture, appurtenances, and consumable stores, as the same existed at the port of Juneau, Alaska, on the 25th day of July, 1931, at the end of the voyage aforesaid, and the freight and

passenger monies pending for said voyage, and in that behalf petitioner is now ready, able and willing, and hereby offers to give its stipulation or stipulations with sufficient surety, conditioned for the payment into this Court by petitioner of petitioner's interest as charterer in and to said Motor Vessel NORCO, her engines, boilers, boats, machinery, tackle, apparel, furniture, appurtenances, and consumable stores, as the same existed at the port of Juneau, Alaska, on the 25th day of July, 1931, at the [6] time and place where the voyage aforesaid terminated, together with the freight and passenger monies pending for said voyage, with interest thereon, said payment to be made whenever the same shall be ordered by this Court.

VIII.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States, and of this Honorable Court.

WHEREFORE, your petitioner prays that this Honorable Court order due appraisement to be made of the amount or value of petitioner's interest as charterer in the Motor Vessel NORCO, her engines, boilers, boats, machinery, tackle, apparel, furniture, appurtenances, and consumable stores, as the same were at the termination of the voyage upon which the accident to Chris Larsen occurred as hereinbefore described, to-wit at the port of Juneau, Alaska, on the 25th day of July, 1931, and due appraisement of petitioner's interest in the

amount of freight and passenger monies pending for said voyage; that this Honorable Court do make an order for the payment by said petitioner of said appraised values into court, or the giving of a stipulation or stipulations by said petitioner as security for the payment thereof into court, according to the value of petitioner's interest, whenever the same shall be ordered, with interest thereon at the rate of 6% per annum from the date of said stipulation; that this Honorable Court will, on the filing of said stipulation, or pending appraisement, of an ad interim stipulation by said petitioner, issue or cause to be issued a monition against all persons, firms, or corporations claiming damages against petitioner by reason of any loss, damage, [7] destruction or injury, whether of or to life or persons, or property done, incurred, occasioned or arising on the voyage, or in connection therewith aforesaid, citing them and each of them to appear before this Honorable Court, or a Commissioner to be appointed by this Court, and there make due proof of their respective claims, and also appear and answer under oath all and singular the matters aforesaid, at or before the time to be designated in said writ, according to the law and rules and practices of this Honorable Court, and that this Honorable Court also enjoin, or otherwise restrain, the prosecution of any and all suit or suits, action or actions, libel or libels, or legal proceedings in any manner or description whatsoever, including execution under the judgment obtained by said Chris Larsen as aforesaid,

except in the present proceedings, in respect to any injuries, losses, destructions and damages, and any and all claims occurring, or arising upon, or in connection with the voyage aforesaid. That this Honorable Court do adjudge that petitioner is not liable to any extent for any such injury, loss, destruction and damage, or for any act, matter or thing done, occasioned or incurred upon the aforesaid voyage of said Motor Vessel NORCO, but if, or in the event this Honorable Court should adjudge that your petitioner is liable to any extent therefor, that such liability be limited to the amount or value of petitioner's interest as charterer in the said Motor Vessel NORCO, her engines, boilers, boats, machinery, tackle, apparel, furniture, appurtenances, and consumable stores, as the same were at the termination of the voyage aforesaid, to-wit at the port of Juneau, Alaska, on the 25th day of July, 1931, and the freight and passenger monies pending for said voyage, all as hereinbefore in this petition set forth, [8] and that such value may be determined by the appraisement of said interest as hereinbefore prayed, and that in the event of petitioner being held liable, the money paid or secured to be paid into Court, as aforesaid, be divided and pro rated among the several claimants against petitioner in proportion to the amount of their respective claims duly approved and confirmed, saving to all parties any priority to which they may be legally entitled and that petitioner may

have such other and further relief as may be deemed meet and just in the premises.

BOGLE, BOGLE & GATES,
Proctors for Petitioner. [9]

[Endorsed]: Filed Oct. 1, 1932. [10]

[Title of Court and Cause.]

ORDER DIRECTING ISSUANCE OF MONITION.

It appearing to this Court that a petition was filed herein on the 1st day of October, 1932, by the Northland Transportation Co., a corporation, charterer of the Motor Vessel "NORCO" for limitation of its liability against any and all claims arising out of or in connection with injuries, losses, destructions or damages sustained on board said vessel upon a voyage commencing at the Port of Seattle, Washington, and termination at the Port of Juneau, Alaska, on the 25th day of July, 1931, and particularly in connection with injuries or damages sustained on board said vessel on or about July 20, 1931, in the harbor of the Port of Seattle, Washington, and it further appearing that said petitioner claims the benefits of exemptions from all liability provided by Sections 4282 to 4289 inclusive, of the Revised Statutes of the United

States, and any and all acts amendatory thereof or supplemental thereto, and that said petitioner desires to contest any and all liability for any and all injury, loss, destruction and damage arising from or in connection with the aforesaid voyage of said Motor Vessel "NORCO", and it further appearing that a certain action for damages designated as Cause No. 247091 has been commenced against petitioner herein, in the Superior Court of the State of Washington for King County, by Chris Larsen, claiming damages in the sum of $25,000.00, by reason of an injury alleged to have been [11] sustained on board said vessel on or about July 20, 1931, on said voyage, on which said cause of action judgment has been entered in the sum of $12,500.00, with interest and costs, and it further appearing that on the 1st day of October, 1932, said petitioner, pursuant to order heretofore entered herein, filed an ad interim stipulation in due form in the sum of $7,500.00, with interest from the date of said stipulation, and it further appearing that by reason of the aforesaid facts a monition should issue in this cause as provided by law, and the court being fully advised in the premises, now therefore, it is hereby

ORDERED, that a monition issue out of this court to and against all persons, corporations, associations, firms, partnerships and their representatives, claiming injury, loss, destruction or damage of whatsoever kind or nature, either to person or property incurred or arising on July 20, 1931, and/

or upon or in connection with the said voyage of the said vessel, terminating at Juneau, Alaska, on the 25th day of July, 1931, citing them to appear before this court and answer said petition and make due proof of their respective claims on or before the 10th day of November, 1932.

It is FURTHER ORDERED that notice of issuance of this monition be given by the United States Marshal by causing copies thereof to be posted in three public places in the City of Seattle, State of Washington, and that further notice of the issuance of said Monition be given by the said United States Marshal by causing a citation setting forth the substance of said Monition to be published in a daily newspaper published in the City of Seattle, State of Washington, daily except Sunday, for fourteen days, thereafter once a week until the return date of said Monition, the date of the first publication to be not less than thirty days prior to such return day. [12]

It is FURTHER ORDERED that a copy of said Monition and of this order be served at least thirty days before said return day of said Monition, upon the said Chris Larsen, by delivering to and leaving the same with either of his attorneys of record, to-wit: George F. Vanderveer or Samuel B. Bassett; and it is further

ORDERED that the further prosecution of the above mentioned action heretofore commenced by the said Chris Larsen against said petitioner in the

Superior Court of the State of Washington for King County, being Cause No. 247091 of the files of said Court, and/or the issuance of execution on the judgment obtained therein and/or the commencement and prosecution of any other suit, action or libel by the said Chris Larsen, involving, embracing or arising out of the said alleged injury and damage set forth in the above mentioned action, and the commencement and prosecution of all other suits, actions, libels and/or proceedings of any kind or nature against the said petitioner for or on account of or in respect to any damage, loss, destruction or injury of any kind or nature to either persons or property, arising or occurring upon or in connection with the said Motor Vessel "NORCO" on July 20, 1931, and/or upon or in connection with the said voyage of said Motor Vessel "NORCO" ending at Juneau, Alaska, on July 25, 1931, be and the same are hereby restrained and enjoined, except before this Court in this proceeding.

It is FURTHER ORDERED that the service of this order as a restraining order may be made in this district by delivering a certified copy thereof to the person or persons to be restrained or their respective proctors or their attorneys, in case action, suit or other legal proceedings have been or are instituted.

Done in open court this 1st day of October, 1932.

JEREMIAH NETERER,
District Judge.

[Endorsed]: Filed Oct. 1, 1932. [13]

[Title of Court and Cause.]

MONITION.

The President of the United States of America:

To the Marshal of the United States for the Western District of Washington, Northern Division, GREETING:

WHEREAS, a petition was filed in the District Court of the United States for the Western District of Washington, Northern Division, on October 1st, 1932, by Northland Transportation Co., a corporation, praying for limitation of its liability as charterer of the Motor Vessel Norco, concerning all injury, loss, destruction or damage arising from or in connection with the voyage of said Motor Vessel Norco, commencing at Seattle, Washington, on July 20, 1931, and ending at Juneau, Alaska, on July 25, 1931, or occurring on or about July 20, 1931, on board said vessel in the Port of Seattle, for the reasons mentioned in said petition, and praying that a monition may issue out of said court, citing all persons, corporations, associations, firms, partnerships and their representatives, claiming damages for any and all injury, loss, destruction or damage as aforesaid; to appear before said court and make due proof of their respective claims, and answer the allegations of said petition and that if it shall appear that the petitioner is not liable for any such loss, damage, destruction or injury, it may be so finally decreed by this Court; and [14]

WHEREAS the petitioner has filed in the office of the clerk of this court an ad interim stipulation in the sum of $7500, with interest thereon at six per cent. per annum from the date of said stipulation as provided by an order heretofore duly entered herein, and the said court having directed by an order made and entered herein that a monition issue against all persons claiming damages for any injuries, losses, destructions or damages occasioned on said voyage, citing them to appear before this court and make due proof of their respective claims, on or before the 10th day of November, 1932, now, therefore

YOU ARE COMMANDED to cite all persons claiming damages for any injury, loss, destruction or damage on said voyage of said Motor Vessel Norco, commencing at Seattle, Washington, and ending at Juneau, Alaska, on July 25, 1931, or occurring in the Port of Seattle, on or about July 20, 1931, to appear before said court and make due proof of their respective claims on or before the 10th day of November, 1932.

YOU ARE ALSO COMMANDED to cite all claimants to appear and answer the petition herein on or before the last named date or within such further time as this court may grant, to have and receive such relief as may be due, and what you have done in the premises do you then make return to this court, together with this writ.

WITNESS the Honorable Jeremiah Neterer, Judge of the District Court of the United States for the Western District of Washington this 1st day of October, 1932.

ED M. LAKIN,
Clerk.
By S. COOK,
Deputy Clerk.

(Served Oct. 3, 1932.)
BOGLE, BOGLE & GATES,
Proctors for Petitioner
Office and Post Office Address:
609-24 Central Building, Seattle, Washington.
[Endorsed]: Filed Oct. 5, 1932.) [15]

[Title of Court and Cause.]

EXCEPTIONS TO PETITION FOR LIMITATION OF LIABILITY

Comes now the respondent, Chris Larsen, and excepts to the petition for limitation of liability herein, upon the following grounds:

1. That said petition does not state facts sufficient to entitle the petitioner to a limitation of liability.

2. That the petitioner by failing and refusing to claim limitation of its liability in the Superior Court of the State of Washington for King County has waived its right to such limitation of liability.

Dated this 7th day of October, 1932.

VANDERVEER & BASSETT,
Proctors for Respondent.

(Served Oct. 7, 1932.)

[Endorsed]: Filed Oct. 8, 1932. [16]

[Title of Court and Cause.]

DEMURRER AND MOTION TO DISMISS PETITION FOR LIMITATION OF LIABILITY

Comes now the respondent, Chris Larsen, and demurs to the petition for limitation of liability herein and moves to dismiss the same on the following grounds:

1. That said petition does not state facts sufficient to entitle the petitioner to limitation of its liability.

2. That there is only one possible claimant and one charterer of the motor vessel Norco and, therefore, the petitioner might have claimed and obtained the advantage and benefit of the limitation of liability statute by proper pleading in the action which has been determined in the Superior Court of the State of Washington for King County.

3. That the petitioner failed and refused to claim the advantage and benefit of the limitation of liability statute, in said Superior Court of the State of Washington, and thereby waived its right to

claim and obtain the advantage and benefit of said statute.

This motion is based upon the files and records herein and upon the affidavit of G. F. Vanderveer, one of the proctors for the Respondent, Chris Larsen, which is attached hereto and made a part hereof by this reference.

G. F. VANDERVEER & S. B. BASSETT,
Proctors for Respondent.

(Served Oct. 7, 1932.)

[Endorsed]: Filed Oct. 8, 1932. [17]

AFFIDAVIT OF G. F. VANDERVEER.

United States of America,
Western District of Washington,
County of King,—ss.

G. F. VANDERVEER, being first duly sworn on oath deposes and says: That he is one of the proctors for the respondent, Chris Larsen, and that he makes this affidavit in support of the respondent's motion to dismiss the petition for limitation of liability herein. That the attached certified copies of the complaint, answer, and reply in the cause entitled Chris Larsen, Plaintiff v. Northland Transportation Co., defendant, being cause No. 247091 of the causes of the Superior Court of the State of Washington for King County, constitute all of the pleadings in said cause and set forth

all of the issues upon which said cause was tried and determined.

G. F. VANDERVEER.

Subscribed and sworn to before me this 7th day of October, 1932.

[Seal] SAMUEL B. BASSETT,
Notary Public in and for the State of Washington, residing at Seattle. [18]

In the Superior Court of the State of Washington for King County.

No. 247,091

CHRIS LARSEN,

Plaintiff,

vs.

NORTHLAND TRANSPORTATION CO., a corporation,

Defendant.

COMPLAINT

The plaintiff complains of the defendant and for cause of action alleges:

I.

That at all the times hereinafter mentioned the defendant was, and still is, a corporation organized under the laws of the State of Washington, was the owner of, and operated, the United States Motorship "Norco" in maritime commerce between

the Port of Seattle and various Alaska ports, maintained offices for the transaction of its business in Seattle, Washington, employed one William Seymour as its manager, and one Ernest Doe, whose true Christian name is to the plaintiff, unknown, as winchman and the plaintiff as an able seaman aboard said Motorship "Norco."

II.

That on the 20th day of July, 1931, at about ten minutes before noon, while said vessel was lying moored at Pier 5, in the City of Seattle, preparatory to loading cargo, at the direction of William Seymour aforesaid, the plaintiff and a longshoreman, whose name is to the plaintiff unknown, hooked the spreader on the fall line onto three empty board slings which were at the time lying on the main deck on the starboard side of the hatchway for the purpose of placing the same on the dock where they would be out of the way of the longshoremen who were to load said cargo. That in some manner unknown to the plaintiff one of said board slings had become foul of a strop around the strongback on which they were lying in such a manner that in lifting the board [19] slings the winchman would also lift said strongback. When the fall line had been hooked onto said board slings as aforesaid, and before the plaintiff had an opportunity to reach a place of safety, said Ernest Doe negligently, and without warning the plaintiff of his intention so to do, went ahead with great speed

on the winches and thereby caused said strongback to be lifted from the deck and swung inboard in such a manner as to strike the plaintiff and throw him against the hatch coaming. That thereupon ordinary prudence required that said Ernest Doe either slack away on the port winch or hold said load on the starboard winch in order to prevent it from again striking the plaintiff, but instead of so doing he negligently went ahead with great speed on the port winch and caused said strongback to swing violently inboard a second time, striking the plaintiff with such violence as to throw him through the open hatchway to the 'tween decks; a distance of ten feet below, where he alighted on his head and shoulders, fracturing his fifth left rib and puncturing his left lung, severely bruising his left shoulder and the back of his right hand and severely injuring the tissues of his brain and causing a traumatic edema of the brain.

III.

That at the time of receiving said injuries the plaintiff was an able bodied man of the age of forty-four years, with a normal life expectancy of 25.27 years, and was actually earning, and capable of earning, wages, with overtime, in the sum of $125.00 a month and subsistence of the further value of $60.00 a month. That as a result of the injuries to his head and lungs he is informed and believes, and therefore alleges, that his general health has been permanently and so seriously impaired that he will never again be able to perform heavy manual labor;

that he has been wholly unable to perform any gainful labor since his injury; that he has been required to expend large sums of money for the services of physicians, and that he is informed and believes that it will be necessary to undergo a serious and dangerous surgical operation to relieve the pressure on his brain, all to his damage in the sum of $25,000.00. [20]

WHEREFORE, the plaintiff demands judgment against the defendant in the sum of $25,000.00, together with his costs and disbursements herein.

VANDERVEER & BASSETT,
Attorneys for Plaintiff.

State of Washington,
County of King,—ss.

CHRIS LARSEN, being first duly sworn on oath, deposes and says: That he is the plaintiff in the above entitled action; that he has read the foregoing complaint, knows the contents thereof and believes the same to be true.

CHRIS LARSEN.

Subscribed and sworn to before me this 30th day of September, 1931.

[Seal] G. F. VANDERVEER,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed in County Clerk's Office, King County, Wash., Oct. 23, 1931.
ABE N. OLSON, Clerk,
By S. R. Battenfield, Deputy. [21]

In the Superior Court of the State of Washington for King County.

No. 247,091

CHRIS LARSEN,

Plaintiff,

vs.

NORTHLAND TRANSPORTATION CO., a corporation,

Defendant.

ANSWER.

Comes now the defendant above named and for answer to plaintiff's complaint herein denies the same and each and every allegation therein contained and particularly denies that plaintiff has been damaged in the sum of $25,000 as therein alleged, or any other sum or sums whatsoever or at all.

FURTHER ANSWERING said plaintiff's complaint, and by way of a first affirmative defense thereto, defendant alleges:

I.

That the alleged injury or damage to the plaintiff, if any, was proximately caused or contributed to by his own negligence and want of care.

FURTHER ANSWERING said complaint, and by way of a second affirmative defense thereto, defendant alleges:

I.

That the condition of the Steamship Norco, its appurtenances, equipment, hatches and deck arrangement were all known to plaintiff and in plain view of said plaintiff during all times mentioned in his complaint and with full knowledge and notice thereof, and without objection or complaint the plaintiff voluntarily assumed all risk incident thereto.

WHEREFORE, defendant prays that plaintiff's complaint be dismissed with prejudice and it have and recover its costs and disbursements herein to be taxed.

BOGLE, BOGLE & GATES,
Attorneys for Defendant.

State of Washington,
County of King,—ss.

WILLIAM SEMAR, being first duly sworn on on oath deposes [22] and says: That he is Secretary-Treasurer of the defendant corporation above named; that he makes this verification by its authority for and in its behalf being authorized so to do; that he has read the above and foregoing answer, knows the contents thereof and believes the same to be true.

WILLIAM SEMAR.

Subscribed and sworn to before me this 18th day of November, 1931.

[Seal] STANLEY B. LONG,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed in County Clerk's Office, King County, Wash., Nov. 19, 1931.
ABE N. OLSON, Clerk,
By S. R. Battenfield, Deputy. [23]

In the Superior Court of the State of Washington for King County.

NO. 247,091

CHRIS LARSEN,

Plaintiff,

vs.

NORTHLAND TRANSPORTATION CO., a corporation,

Defendant.

REPLY.

Replying to each of the two affirmative defenses in the defendant's Answer the plaintiff denies each and every allegation therein contained.

WHEREFORE, having fully replied, the plaintiff demands judgment in accordance with the prayer of his complaint.

VANDERVEER & BASSETT,
Attorneys for Plaintiff.

State of Washington,
County of King.—ss.

CHRIS LARSEN, being first duly sworn on oath, deposes and says: That he is the plaintiff in the above entitled action; that he has read the foregoing Reply, knows the contents thereof and believes the same to be true.

CHRIS LARSEN.

Subscribed and sworn to before me this 20th day of November, 1931.

[Seal] G. F. VANDERVEER,
Notary Public in and for the State of Washington, residing at Seattle.

Received,
Bogle, Bogle & Gates,
Nov. 21, 1931,
Seattle. [24]

In the Superior Court of the State of Washington
for the County of King.

NO. 247,091

CHRIS LARSEN,

Plaintiff,

vs.

NORTHLAND TRANSPORTATION CO.,
a corporation,

Defendant.

State of Washington,
County of King.—ss.

I, ABE N. OLSON, County Clerk of King County, and ex-officio Clerk of the Superior Court of the State of Washington for the County of King, do hereby certify that I have compared the foregoing copy with the original complaint—answer—and reply in the above entitled cause as the same appears on file and of record in my office, and the same is a true and perfect transcript of said original and of the whole thereof.

WITNESS my hand and seal of the said Superior Court, at my office in Seattle, this 7th day of October, 1932.

[Seal] ABE N. OLSON, Clerk.

By A. L. Lawrence, Deputy. [25]

[Title of Court and Cause.]

DECISION

(On Limitation, etc.)

November 22, 1932.

BOGLE, BOGLE & GATES,
Proctors for Petitioner;
VANDERVEER & BASSETT,
Proctors for Respondent.

NETERER, District Judge:

The suitor (movant) pursuing his common law remedy in the state court for personal injury by negligence (section 24, J. C.) obtained judgment, and thereupon the judgment debtor petitioned this court for limitation of liability "to charterer's interest in the vessel (etc.) * * * and freights, and passenger moneys pending on the voyage (etc.) * * *." (Sec. 4283, R. S.).

The right to limit is challenged, for that there being only one claimant and the value of the interest in the vessel was not pleaded and determined in the state court, and by failure, the right to limit is waived and the issue is now res judicata.

Limitation proceedings involve two issues: (1) liability; (2) limitation of liability when liability is adjudged. The right to invoke the state court jurisdiction under section 24, J. C., to [26] adjudicate negligence where a jury trial is afforded, is clear. Langness v. Green, 282 U. S. 531, at 539.

In Langness v .Green, supra, petition for limitation was presented in the federal court after action commenced in the state court. The state court afforded a common law remedy on the negligence issue, and the federal statute a right to seek limitation of liability in the federal district court.

When there is one possible claimant, the charterer or owner may claim in the state court that the judgment on negligence, if any, be limited to the ship's value, and if the right is not contested, judgment accordingly may follow, and " * * * the advantages of this section (4283) may be obtained by proper pleading. * * * In the due course of the exercise of its common law powers (the state court) was competent to entertain a claim of the ship owner for limitation of liability, and afford the appropriate relief under the statute dealing with that subject. * * * Notwithstanding this, however, the ship owner was free to invoke the jurisdiction of the federal district court." But this may be done *only* when the "question is raised (in the state court) as to the right of the petitioner to limit liability." Ex Parte Green, 286 US 437, at 439.

To pursue the common law remedy in the state court, the suitor must admit the right to limit liability, if raised, thus withdrawing from the case any federal question, and his recovery, if any, will be limited to the value of the charterer's interest. But, if issue is taken upon the right to limit, when this court has jurisdiction of the controversy. Ex

parte Green, 56 Fed. (2) 644; affirmed 286 US 437; Langness v. Green, 282 US 531.

The state court being competent to give common law remedy and having jurisdiction to determine the value of the charterer's interest in the vessel, he being the only claimant, and the claim could with propriety have been determined in that suit, it was his [27] duty to plead the limitation of liability, if any, to the value of his interest in the ship. An adequate remedy was available and not put forward, and escape from the judgment which followed cannot be made. American Surety Co. v. Baldwin, ... US ....., decided November 14, 1932. Compare Mitchell v. First National Bank of Chicago, 180 US 471; Lion Bonding & Surety Company v. Karatz, 262 US 77, 90. The judgment upon the merits is res judicata not only as to the issue presented, but also as to rights and issues which might have been presented. Baltimore Steamship Company v. Phillips, 274 US 316; see, also, United States v. Sakharam Ganesh Pandit, 15 Fed. (2) 285; certiorari denied, 273 US 759.

The petitioner was not at liberty to present his defense by piecemeal and litigate the liability in the state court. Werlein v. New Orleans, 177 US 390; United States v. California & Oregon Land Company, 192 US 355. Grubb v. Public Utilities Comm., 281 US 470, 479. See, also, American Surety Co. v .Baldwin, supra.

From the foregoing, it is obvious that my view is out of harmony with In Re Moran Bros. Contracting Co., Inc., 1932 AMC 910; and In Re Starin, 124 Fed. 101, and the W. T. Wellington, 235 Fed. 728. In The Benefactor, 103 US. 239 and Monongahela River Consol. Coke & Coal Co. v. Hurst, 200 Fed. 711, there was more than one creditor in each case.

While the instant issue was not raised by answer, but rather in the nature of exceptive allegations, the issue at bar was submitted upon the right to limit liability upon the facts stated, and acting upon the assumption that upon this challenge is agreed the right to limit liability shall be now finally determined, an order dismissing the petition, endorsing such understanding, may on notice be presented.

NETERER,
United States District Judge.

[Filed Nov. 22, 1932.]

In the United States District Court for the Western District of Washington, Northern Division.

In Admiralty.

No. 13,301.

In the Matter of the Petition of NORTHLAND TRANSPORTATION CO., a corporation, Charterer of the American Motor Vessel NORCO for LIMITATION OF LIABILITY.

ORDER OF DISMISSAL.

This matter having come duly on for hearing before the above entitled court on the 31st day of October, 1932, on the respondent's demurrer to, and motion to dismiss the petition for limitation of liability herein, the petitioner appearing by Messrs. Bogle, Bogle and Gates, its proctors, the respondent appearing by Messrs. Vanderveer and Bassett, his proctors, and the court having duly considered the record herein and the arguments of the proctors for both parties, and it appearing therefrom without dispute that the respondent brought an action at common law against the petitioner in the Superior Court of the State of Washington for King County for the recovery of damages for personal injuries alleged to have been suffered by the respondent through the petitioner's negligence, and it further appearing that the petitioner herein made a general appearance in said action and answered the respondent's complaint, but wholly failed to make any claim of right to limit its liability under

the laws of the United States, and it appearing that said action was in due course tried before a jury which returned a verdict in the respondent's favor, assessing his damages in the sum of $12,500, and that thereafter, on the 1st day of October, 1932, said court duly entered a judgment on said verdict in favor of the respondent and against the petitioner for the sum of $12,500, and costs, and it further [29] appearing that no other claim has been filed in response to the monition, and the time for filing claims having expired on the 10th day of November, 1932, and petitioner has not shown or contended that other claims exist, and it further appearing that the Superior Court of the State of Washington for King County had full jurisdiction to determine the value of the petitioner's interest in the American Motor Vessel "Norco" and all pending freight and to limit the petitioner's liability accordingly, and it appearing that its jurisdiction to do so was in no manner questioned by the respondent herein,

THE COURT NOW CONCLUDES that, by its failure to make any claim in said court of its right to limit its liability, the petitioner herein waived such right, and that all matters pertaining to the merits of said common law action, including petitioner's right to limit its liability to the respondent, were fully adjudicated, and

IT IS NOW ORDERED that the petition for limitation of liability herein be dismissed and that

the order heretofore made herein, restraining the further prosecution of said action in the Superior Court of the State of Washington for King County, and or the issuance of an execution on the judgment obtained therein be, and the same is hereby, dissolved. Petitioner excepts and same is allowed.

Done in open court this 5th day of December, 1932.

JEREMIAH NETERER,
District Judge.

[Endorsed]: Served and filed Dec. 5, 1932. [30]

[Title of Court and Cause.]

PETITION FOR APPEAL AND FOR STAY OF EXECUTION.

To the Honorable Jeremiah Neterer, District Judge:

The petitioner, Northland Transportation Co., a corporation, feeling aggrieved by the order of dismissal made and entered in the above entitled cause on the 5th day of December, 1932, does hereby appeal from said order of dismissal and each and every part thereof, and from each and every adverse ruling made in the above entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit and prays that its appeal be allowed and execution on said order of dismissal be stayed pending the determination of said appeal, and that

citation be issued and other proceedings be had as provided by law.

Dated this 5th day of December, 1932.

NORTHLAND TRANSPORTATION CO.,
a corporation, Petitioner,
By BOGLE, BOGLE & GATES,
Its Proctors.

[Endorsed]: Served and filed Dec. 5, 1932. [31]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now Northland Transportation Co., a corporation, petitioner-appellant, and assigns errors in the rulings and proceedings in the above entitled cause on the part of the Trial Court, the District Court of the United States for the Western District of Washington, Northern Division, as follows:

1. That said trial court erred in its memorandum decision filed herein and in the order of dismissal entered herein on December 5, 1932, in ruling and adjudging that the Superior Court of the State of Washington for King County had full jurisdiction to determine the value of the petitioner's interest in the American motor vessel Norco and all pending freight, and to limit the petitioner's liability accordingly.

2. That said trial court erred in its memorandum decision filed herein and in the order of dis-

missal entered herein on December 5, 1932, in ruling and adjudging that petitioner by failing to make any claim in the Superior Court of the State of Washington for King County, of its right to limit its liability, waived its right to do so in this proceeding.

3. That said trial court erred in its memorandum decision filed herein and in the order of dismissal entered herein on December 5, 1932, in ruling and adjudging that all matters pertaining to the merits of the common law action in the Superior Court [32] of the State of Washington for King County, including the petitioner's right to limit its liability to the respondent, were fully adjudicated.

4. That said trial court erred in its memorandum decision filed herein and in the order of dismissal entered herein on December 5, 1932, in ruling and adjudging that the petition for limitation of liability herein be dismissed.

5. That said trial court erred in its memorandum decision filed herein and in the order of dismissal filed herein on December 5, 1932, in ruling and adjudging that the order heretofore made herein, restraining the further prosecution of said action in the Superior Court of the State of Washington for King County and/or the issuance of an execution of the judgment obtained therein be dissolved.

6. That said trial court erred in the order of dismissal filed herein on December 5, 1932, in finding and ruling that petitioner failed to make any

claim of right to limit its liability under the laws of the United States in said action in the Superior Court of the State of Washington for King County.

7. That said trial court erred in the order of dismissal filed herein on December 5, 1932, in finding and ruling that no other claim has been filed in response to the monition, that the time for filing claims expired on November 10, 1932, and petitioner has not shown or contended that other claims exist.

8. That said trial court erred in entering the order of dismissal filed herein on December 5, 1932, and in not denying the respondent's motion to dismiss, and in not overruling the respondent's demurrer to the petition for limitation of liability, and in not overruling respondent's exceptions to the petition for limitation of liability. [33]

WHEREFORE petitioner-appellant prays that said order of dismissal be reversed.

BOGLE, BOGLE & GATES,
Proctors for Petitioner-Appellant.

[Endorsed]: Served and filed Dec. 6, 1932. [34]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND STAYING EXECUTION.

On petition for appeal and for stay of execution, and all parties being represented,

IT IS ORDERED that the appeal be allowed as prayed and that citation on appeal issue; and

IT IS FURTHER ORDERED that the sum of $7,500.00 be, and the same hereby is, fixed as the amount of bond on appeal, to serve both as cost bond and supersedeas bond, and that upon the filing thereof execution upon the order of dismissal entered herein shall be stayed, and the restraining order heretofore entered herein, and the monition and citation heretofore issued herein shall remain in full force and effect during the pendency of the appeal.

Done in open court this 5th day of December, 1932.

JEREMIAH NETERER,
District Judge.

[Endorsed]: Served and filed Dec. 5, 1932. [35]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To: CHRIS LARSEN, respondent, and to Messrs. Vanderveer & Bassett, his proctors, and to the HONORABLE JEREMIAH NETERER and ED M. LAKIN, Clerk of the above entitled court.

NOTICE IS HEREBY GIVEN that petitioner, Northland Transportation Co., a corporation, hereby appeals to the United States Circuit Court of

Appeals for the Ninth Circuit from the order of dismissal made and entered herein on the 5th day of December, 1932, and from each and every part thereof, and from each and every adverse ruling in the above entitled cause.

Dated this 5th day of December, 1932.

NORTHLAND TRANSPORTATION CO.,
a corporation, Petitioner,
By BOGLE, BOGLE & GATES,
Its Proctors.

[Endorsed]: Served and filed Dec. 5, 1932. [36]

[Title of Court and Cause.]

COST AND SUPERSEDEAS BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS:

That we, Northland Transportation Co., a corporation, as principal, and Fireman's Fund Indemnity Co., a corporation, authorized to transact business in the State of Washington, as surety, are held and firmly bound unto Chris Larsen, in the sum of Seven Thousand Five Hundred ($7,500.00) Dollars, lawful money of the United States, to be paid to said Chris Larsen, respondent herein, for which payment, well and truly to be made, we bind our, and each of our successors and assigns jointly and severally firmly by these presents.

Sealed with our seals and dated at Seattle, Washington, this 6th day of December, 1932.

WHEREAS, the said Northland Transportation Co., a corporation, principal herein, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the order of dismissal entered in the United States District Court for the Western District of Washington, Northern Division on the 5th day of December, 1932; and

WHEREAS, the said Northland Transportation Co., a corporation, principal herein, desires during the process of said appeal [37] to stay the execution of said order of dismissal, and to keep in full force and effect during the pendency of said appeal the restraining order heretofore entered herein, and the monition and citation heretofore issued herein in the United States District Court for the Western District of Washington; and

WHEREAS, the said court has heretofore fixed the amount of the supersedeas bond and cost bond on appeal, and has ordered that one bond may be filed in the total sum of Seven Thousand Five Hundred ($7500.00) Dollars, to act as a cost bond and as a supersedeas bond on appeal,

NOW, THEREFORE, the condition of this obligation is such that if the above bounden Northland Transportation Co., a corporation, principal herein, shall prosecute said appeal to effect, and answer all damages and costs if it fail to make its plea good, and shall abide by and perform what-

ever decree may be rendered by the United States Circuit Court of Appeals for the Ninth Circuit in the cause, or on the mandate of that court to the District Court, then this obligation shall be void, otherwise the same to be and remain in full force and effect.

NORTHLAND TRANSPORTATION CO., a corporation,
By BOGLE, BOGLE & GATES,
Its Attorneys.
Principal.

[Seal] FIREMAN'S FUND INDEMNITY CO., a corporation,
By Frank Taylor,
Attorney-in-fact,
Surety [38]

The foregoing bond as an appeal and supersedeas bond in the above entitled cause is hereby approved as to form, amount, and sufficiency of surety, and receipt of a copy thereof is hereby acknowledged this 6th day of December, 1932.

VANDERVEER & BASSETT,
Proctors for Respondent.

The foregoing bond and sufficiency of surety thereon is, on this 6th day of December, 1932, approved as an appeal and supersedeas bond.

NETERER,
District Judge.

[Endorsed]: Filed Dec. 6, 1932. [39]

[Title of Court and Cause.]

NOTICE OF FILING COST AND SUPERSEDEAS BOND.

To: Chris Larsen, Respondent, and to Vanderveer & Bassett, his Proctors:

You and each of you will please take notice that on the 6th day of December, 1932, the Northland Transportation Co., a corporation, petitioner in the above entitled cause, filed in the office of the District Court of the United States for the Western District of Washington, Northern Division, at Seattle, Washington, a cost and supersedeas bond in the total sum of Seven Thousand Five Hundred ($7500.00) Dollars, a copy of which bond is herewith served upon you, and that the surety upon said cost and supersedeas bond on appeal is Fireman's Fund Indemnity Co., a corporation, which said surety has an office and resident agent in the Colman Building, Seattle, Washington.

Dated at Seattle, Washington, this 6th day of December, 1932.

BOGLE, BOGLE & GATES,
Proctors for Petitioner.

[Endorsed]: Served and filed Dec. 6, 1932. [40]

[Title of Court and Cause.]

STIPULATION AS TO RECORD ON APPEAL.

It is stipulated that apostles on appeal containing all matters designated by the praecipe filed by appellant shall be sufficient record on appeal.

BOGLE, BOGLE & GATES,
Proctors for Appellant.

[Endorsed]: Filed Dec. 15, 1932.

VANDERVEER & BASSETT,
Proctors for Appellee.

ORDER.

In accordance with the foregoing stipulation, it is so ordered.

Done in open court this 15th day of December, 1932.

JEREMIAH NETERER,
District Judge.

[Endorsed]: Filed Dec. 15, 1932. [41]

[Title of Court and Cause.]

PRAECIPE FOR APOSTLES ON APPEAL.

To the Clerk of the Above Entitled Court:

You will please prepare and certify a true copy of the following papers on file in your office, and of record in the above entitled cause, as apostles on appeal, to-wit:

1. Names and addresses of proctors and title.
2. Statement.
3. Petition for limitation of liability.
4. Order directing issuance of monition.
5. Monition.
6. Exceptions to petition for limitation of liability.
7. Demurrer and motion to dismiss petition for limitation.
8. Affidavit of G. F. Vanderveer with exhibits attached thereto.
9. Court's memorandum decision.
10. Order of dismissal.
11. Petition for appeal and for stay of execution.
12. Assignment of errors.
13. Order allowing appeal and staying execution.
14. Notice of appeal.
15. Cost and supersedeas bond on appeal.
16. Notice of filing bond. [42]
17. Stipulation and order as to record on appeal.
18. Citation.
19. This praecipe.

In the preparation of said record there may be omitted the full title of various pleadings, the full filemark thereon, and the verification thereof, it

being sufficient that the record on appeal contain a plain designation of the various pleadings and papers, together with a notation of the date when the same were filed and/or served.

BOGLE, BOGLE & GATES,
Proctors for Appellant.

[Endorsed]: Filed Dec. 15, 1932. [43]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO APOSTLES ON APPEAL.

United States of America,
Western District of Washington.—ss

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 43, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same rmain of record and on file in the office of the Clerk of said District Court, and that the same constitute the apostles on appeal herein, in said cause, from the judgment of said United States District Court for the Western District of Washington, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, to-wit: [44]

Clerk's fees (Act of Feb. 11, 1925) for making record, certificate or return, 85 folios at 15c per folio,	$12.75
Appeal fee (Section 5 of Act)	5.00
Certificate of Clerk to Apostles on Appeal	.50
Total	$18.25

I hereby certify that the above cost of preparing and certifying said apostles on appeal, amounting to $18.25 has been paid to me by the proctors for the appellant.

I further certify that I transmit herewith the original citation in the above-entitled cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of said District Court, at Seattle, in said District, this 28th day of December, 1932.

[Seal] ED. M. LAKIN,
Clerk of the United States District Court for the Western District of Washington,
By T. W. EGGER,
Deputy. [45]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,
Western District of Washington,
Northern Division,—ss.

THE PRESIDENT OF THE UNITED STATES to CHRIS LARSEN, Respondent-Appellee, and to MESSRS. VANDERVEER & BASSETT, his Proctors,

GREETINGS:

You and each of you are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, City of San Francisco, State of California, within thirty (30) days from the date hereof, pursuant to an appeal in said Court duly filed in the office of the Clerk of the United States District Court for the Western District of Washington, Northern Division, wherein Northland Transportation Co., a corporation, is appellant, and Chris Larsen is appellee, then and there to show cause, if any there be; why the order of dismissal of the United States District Court for the Western District of Washington, Northern Division, signed by the Honorable Jeremiah Neterer, Judge of said Court, upon December 5, 1932, and filed on said date with the clerk of said Court, as to which this appeal is filed and taken, should not be corrected and reversed, and why speedy justice should [46] not be done in that behalf.

WITNESS the Honorable Jeremiah Neterer, Judge of the District Court of the United States for the Western District of Washington, Northern Division, this 6th day of December, 1932.

[Seal] JEREMIAH NETERER,
United States District Judge.

[Endorsed]: Served and filed Dec. 6, 1932. [47]

[Endorsed]: No. 7036. United States Circuit Court of Appeals for the Ninth Circuit. Northland Transportation Co., a Corporation, Charterer of the American Motor Vessel "Norco," Appellant, vs. Chris Larsen, Appellee. Apostles on Appeal. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed December 30, 1932.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7036

United States

Circuit Court of Appeals

For the Ninth Circuit.

NORTHLAND TRANSPORTATION CO., a Corporation, Charterer of the American Motor Vessel "NORCO",

Appellant,

vs.

CHRIS LARSEN,

Appellee.

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated Term, to wit, the October Term, A. D. 1932 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Wednesday the thirty-first day of May in the year of our Lord One Thousand Nine Hundred and thirty-three.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable FRANCIS A. GARRECHT, Circuit Judge.

No. 7036.

NORTHLAND TRANSPORTATION CO., a Corporation, Charterer of the American Motor Vessel "NORCO",

Appellant,

vs.

CHRIS LARSEN,

Appellee.

ORDER OF SUBMISSION

ORDERED above cause argued by Mr. James M. Wallace, proctor for appellant, and by Mr. Sam B. Bassett, proctor for appellee, and submitted to the court for consideration and decision.

At a stated Term, to wit. the October Term, A. D. 1932 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the twenty-first day of August in the year of our Lord One Thousand Nine Hundred and thirty-three.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE.

By direction of the court, IT IS ORDERED that the opinion this day rendered by this court in above cause be forthwith filed by the clerk and that a decree be filed and recorded in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION.

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Before: WILBUR, SAWTELLE and GARRECHT, Circuit Judges:

WILBUR, Circuit Judge:

Appellant brought this proceeding in admiralty for the limitation of its liability for an accident occurring on board the Norco, a vessel chartered by the appellant, Northland Transportation Company. The petition alleged that on July 20, 1931, while the vessel was loading at the port of Seattle, Chris Larsen, while engaged in loading said vessel as a member of the crew thereof, suffered personal injuries; that the injured seaman brought an action in the Superior Court of the State of Washington for King County to recover $25,000 damages by reason of the injuries received through the alleged negligence of a winch driver in operating the winches, as result of which the seaman was thrown through an open hatchway and injured; that a verdict and judgment in said action in the Superior Court of King County was rendered on September 27, 1932 in favor of the seaman and against the petitioner for a sum of $12,500 with interest and costs; that the value of the interest of petitioner in the vessel, her machinery, tackle, etc., together

with all freight and passenger moneys pending on said voyage amounted to $4651.98, of which $3856.00 was the amount of freight and passenger moneys pending on the voyage; that the vessel was staunch and seaworthy and well and sufficiently supplied, manned and equipped, etc.; and that the injury was without the consent or privity or knowledge, design or neglect of the petitioner, or any of its directors, officers, agents or servants. Petitioner claims the right to have its liability limited to the value of the vessel, etc., and prayed for appropriate relief. (Rev. Stat. §§4282 to 4289; 46 U. S. C. A. §§183, 185, 186.)

Appellee filed exceptions to the petition for limitation of liability upon the ground that it did not state facts sufficient to entitled the petitioner to a limitation of liability and that by reason of the failure and refusal of the petitioner to claim limitation of liability in the Superior Court of Washington for King County it had waived its right to limitation of such liability. The appellee also filed a demurrer and motion to dismiss upon the same grounds and upon an affidavit thereto attached, which affidavit set forth the pleadings in the action in said Superior Court. It appears therefrom that the appellee, plaintiff therein, counted upon the negligence of Ernest Doe in operating a winch on board the vessel Norco while it was moored at pier No. 5 in the city of Seattle preparatory to loading cargo. The answer of the Northland Transporta-

tion Company, appellant herein, and defendant therein, consisted of a general denial, a plea of contributory negligence and a plea of assumption of risk.

The District Court sustained the appellee's contentions and dismissed the proceedings upon the ground, as stated in the order of dismissal, that by its failure to make any claim of its right to limit its liability in the common law action in the Superior Court the petitioner waived such right, and that all matters pertaining to the merits of said common law action including petitioner's right to limit its liability were res adjudicata. Petitioner appeals from the decree of dismissal.

It has been held in many instances by district courts sitting in admiralty and by circuit courts of appeals reviewing those decisions that the right of the owner to limit his liability is in no wise affected by the fact that the claim against him had been prosecuted to judgment in a common law court and that a judgment had been rendered in that court for the full amount of the injury without reference therein to the limitation of the owner's liability as provided by federal law. *S. A. McCaully* (D. C.), 99 Fed. 302; *Re Old Dominion* (D. C.), 115 Fed. 845; *Gleason v. Duffy* (C. C. A. 7), 116 Fed. 298; *The Ocean Spray* (D. C. Cal.), 117 Fed. 971; *Re Starin* (D. C. N. Y.), 124 Fed. 101; *The City of Boston* (D. C. Mass.), 159 Fed. 257; *The Hoffmans* (D. C. N. Y.), 171 Fed. 455; *Re P. Sanford Ross* (D. C. N. Y.), 196 Fed. 921; *The Victor* (D. C. N.

Y.), 1 F. Supp. 931. It has been so decided by this court in *Strong v. Holmes* (C. C. A. 9), 238 Fed. 554. Also, it has been held that the admiralty court after a decree fixing the responsibility for the injury may entertain a petition for the limitation of the liability of the owner to the value of the vessel, etc., although the owner had not theretofore raised the question in the admiralty court. *The Benefactor*, 103 U. S. 239; *The Monongahela River Consol. Coal and Coke Co. v. Hurst*, 200 Fed. 711; *The Defender*, 214 Fed. 316; *The Ethelstan*, 246 Fed. 187. It appears from these cases that the proceeding to limit the owner's liability is separate and distinct from the common law remedy, or the question of liability in admiralty.

Appellee claims that these cases are not authority upon the proposition involved here by reason of the fact that the question of whether or not the judgment of the common law court was res adjudicata as to the amount of the claim was not raised in those cases. If not specifically raised, it was necessarily and obviously involved and these decisions must be taken as authority for the proposition that the judgment of the common law court fixing the amount of the damage and the responsibility of the owner therefor is not res adjudicata as to the right of the owner to limit his liability in the subsequent proceeding in an admiralty court, where the question was not raised in the common law action.

Appellee contends that in any event these decisions in effect have been overruled by *Langhes v. Green*,

282 U. S. 531, and *Ex Parte Green*, 286 U. S. 437. It was said in the latter case (*Ex Parte Green*), referring to the former case (*Langnes v. Green*),

> "It is clear from our opinion that the state court has no jurisdiction to determine the question of the owner's right to a limited liability, and that if the value of the vessel be not accepted as the limit of the owner's liability, the federal court is authorized to resume jurisdiction and dispose of the whole case."

In what way did the claimant "accept" the value of the vessel as the limit of the owner's liability? He sought and secured a judgment for more than twice the value of the vessel, etc. The net result of these two decisions is that the Supreme Court holds that the District Court sitting in admiralty has exclusive jurisdiction to determine all the questions involved in a proceeding for the limitation of liability. These questions include, first, the question of responsibility of the owner of the vessel for the negligence upon which the claimant relies; second, if not personally responsible, the amount to which the recovery of the claimant should be limited, which requires the fixing of the value of the vessel, its appurtenances, freight, etc.; third, the application of that value or, at the election of the petitioner, the application of the proceeds of the sale of the vessel to the claim. (Admiralty Rule 51.) The appellee necessarily concedes this obvious result of these decisions but contends that, inasmuch as the

Supreme Court in *Langnes v. Green,* supra, acknowledges the power of the Superior Court to recognize the right of the owner to limit his liability by appropriate proceedings in the Superior Court, it necessarily follows that that court had jurisdiction of the matter, provided, however, in view of the later decision in *Ex Parte Green,* supra, that the question was not contested in the Superior Court. Consequently, appellee claims that, since he did not contest the right to limit the liability but on the contrary admitted that right by counting on the negligence of a fellow servant in his complaint in the Superior Court, making it appear on the face of the complaint that the owner was entitled as a matter of right to limit its liability in that Superior Court action to the value of the vessel, etc., the owner's failure to claim that right in that action operated as a waiver of the right and, also, resulted in an estoppel by the judgment rendered therein. This contention is based on the principle that a judgment estops the parties not only as to all things which were in fact adjudicated therein, but also all things which might have been adjudged therein.

Parties are not required to set up and litigate rights over which the court had no jurisdiction in order to protect themselves in enforcing their rights in a court which has jurisdiction. *Ash Sheep Co. v. United States,* 252 U. S. 159; *T. B. Harms & Francis, Day & Hunter v. Stern,* 229 Fed. 42; 34 C. J. 935, §1339.

We conclude that the judgment of the Superior

Court fixing the amount of the claimant's injuries and awarding a judgment for the value thereof is not res adjudicata as to the right of the owner, by appropriate proceedings in an admiralty court, to limit the recovery to the value of the vessel, etc., where there was no attempt to raise that question in the Superior Court. We need go no further in this matter.

The remaining question, if it is a separate and distinct question, is as to whether or not the owner who has the right to set up its claim to the limitation of liability in the state court is deemed to have waived that right by reason of its failure so to do and by reason of allowing the case to proceed to judgment without at any time invoking the principle of limited liability. We are unable to perceive upon what ground a waiver can be predicated where the owner was under no obligation to submit to the Superior Court its claim to a limitation of liability over which that court had no jurisdiction. By not raising the question at all in the Superior Court the owner allowed the claimant to have the full benefit of the common law remedy including a jury trial. Failure to raise this question in the state court thus giving full recognition to claimant's common law right to a trial by jury, was a wise and generous recognition of that right permitting as it did the trial of the question of negligence before a jury unhampered by any of the questions peculiarly cognizable in the admiralty court. We conclude then, that there is nothing in the decisions of the

Supreme Court in *Langnes v. Green*, supra, or *Ex Parte Green*, supra, inconsistent with the right of the appellant to subsequently litigate the question of limitation of liability in the admiralty court, on the contrary that this is the purport and effect of those decisions. The decisions of the Supreme Court in *Langnes v. Green* and *Ex Parte Green* are in full accord with the earlier decisions holding that the question of the owner's right to limit his liability was not prejudiced by a judgment at law or a decree in admiralty fixing the amount of the claimant's recovery, if the right to limit liability was not theretofore presented. See also, *In re Moran Bros. Contracting Co.*, 1 F. Supp. 932; and, *The Kearny*, 1933 A. M. C. 705.

Decree reversed and case remanded for further proceedings in accordance herewith.

(Endorsed): Opinion. Filed Aug. 21, 1933. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

No. 7036

NORTHLAND TRANSPORTATION CO., a corporation, Charterer of the American Motor Vessel "NORCO",

Appellant,

vs.

CHRIS LARSEN,

Appellee.

DECREE.

APPEAL from the District Court of the United States for the Western District of Washington, Northern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the District Court of the United States for the Western District of Washington, Northern Division, and was duly submitted:

ON CONSIDERATION WHEREOF, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, reversed with costs in favor of the appellant and against the appellee, and that this cause be, and hereby is remanded to the said District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by this Court, that the appellant recover against the appellee for its costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered Aug. 21, 1933. Paul P. O'Brien, Clerk.

At a stated Term, to wit, the October Term, A. D. 1933 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the thirtieth day of October in the year of our Lord One Thousand Nine Hundred and thirty-three.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable FRANCIS A. GARRECHT, Circuit Judge.

[Title of Cause.]

ORDER DENYING PETITIONS FOR REHEARING.

Upon consideration thereof, and of the petition of Amicus Curiae, filed September 19, 1933, and by direction of the court, IT IS ORDERED that the petition of appellee, filed September 18, 1933, for a rehearing of above cause be, and hereby is denied.

[Title of Court and Cause.]

ORDER STAYING ISSUANCE OF MANDATE.

Upon application of Messrs. Vanderveer and Bassett, proctors for the appellee, and good cause there-

for appearing, IT IS ORDERED that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including December 4, 1933; and in the event the petition for a writ of certiorari to be made by the appellee herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR,
United States Circuit Judge.

Dated: San Francisco, California, October 30, 1933.

[Endorsed]: Filed Oct. 30, 1933. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 7036.

NORTHLAND TRANSPORTATION CO., a Corporation, Charterer of the American Motor Vessel "NORCO",

Appellant,

vs.

CHRIS LARSEN,

Appellee.

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty-three (63) pages, numbered from and including 1 to and including 63, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this 8th day of November, A. D. 1933.

[Seal] PAUL P. O'BRIEN,

Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 8, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.